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(2)

No. 02-806

Supreme Court, U.S.
FILED
DEC 16 2002
CLERK

In The
Supreme Court of the United States

LUELLA BURKE, Warden,
Petitioner,

vs.

KERMIT HAYNES,
Respondent.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

**MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS
AFFIDAVIT OF INDIGENCY**

*** BRIEF IN OPPOSITION ***

PROOF OF SERVICE

SUBMITTED BY:
SUSAN M. MEINBERG (P 34433)
Assistant Defender

MARLA R. McCOWAN (P 57218)
Assistant Defender
(Counsel of Record)
State Appellate Defender Office of Michigan
645 Griswold Street
3300 Penobscot Building
Detroit, Michigan 48226
(313) 256-9833

18 pp

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In The
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LUELLA BURKE, Warden,

Petitioner,

vs.

KERMIT HAYNES,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Respondent, KERMIT ELDRIDGE HAYNES, who is indigent, asks leave to file the attached Brief in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit without prepayment of costs, and to proceed *in forma pauperis* pursuant to rule 39.

The Respondent's affidavit in support of this application is attached hereto.

STATE APPELLATE DEFENDER OFFICE

Counsel for Respondent

BY: _____

MARLA R. McCOWAN (P 57218)
Assistant Defender
3300 Penobscot Building
645 Griswold
Detroit, Michigan 48226
(313) 256-9833

Date: December 16, 2002

IN THE
SUPREME COURT FOR THE UNITED STATES

KERMIT HAYNES,

Petitioner-Appellee,

-vs-

WARDEN LUELLA BURKE,

Respondent-Appellant.
_____/

AFFIDAVIT ACCOMPANYING MOTION FOR PERMISSION TO APPEAL *IN FORMA PAUPERIS*

Affidavit in Support of Motion

I swear or affirm under penalty of perjury that, because of my poverty, I cannot pre-pay the docket fees of my appeal or post a bond for them. I believe I am entitled to redress. I swear or affirm under penalty of perjury that my answers on this form are true and correct. (28 U.S.C. §1746; 18 U.S.C. §1621.)

Signed: Kermit Haynes Date: 12/4/02

Instructions:

Complete all questions in this application and then sign it. Do not leave any blanks: if the answer to a question is "0," "none," or "not applicable (N/A)," write in that response. If you need more space to answer a question or to explain your answer, attach a separate sheet of paper identified with your name, your case's docket number, and the question number.

My issue on appeal is:

Whether my guilty plea was made involuntarily due to ineffective assistance of counsel.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	Average monthly amount during the past 12 months	Amount expected next month
Employment	$ 0	$ 0
Self-employment	$ 0	$ 0
Income from real property (such as rental income)	$ 0	$ 0
Interest and dividends	$ 0	$ 0
Gifts	$ 0	$ 0
Alimony	$ 0	$ 0
Child Support	$ 0	$ 0
Retirement (such as social security, pensions, annuities, insurance)	$ 0	$ 0
Disability (such as social security, insurance payments)	$ 0	$ 0
Unemployment payments	$ 0	$ 0
Public assistance (such as welfare)	$ 0	$ 0
Other (specify):	$ 0	$ 0
Total monthly income:	**$** 0	**$** 0

2. List your employment history, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of employment	Gross monthly pay
N/A	N/A	N/A	0

3. List your spouse's employment history, most recent employer first. (Gross monthly pay is before taxes or deductions.)

Employer	Address	Dates of employment	Gross monthly pay
N/A	N/A	N/A	0

4. How much cash do you and your spouse have? $ 0

Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
N/A	N/A	$ 0	$ 0
		$	$
		$	$

If you are a prisoner, you must attach a statement certified by the appropriate institutional officer showing all receipts, expenditures, and balances during the last six months in your institutional accounts. If you have multiple accounts, perhaps because you have been in multiple institutions, attach one certified statement of each account.

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

	Value	
Home	$ 0	
Other real estate	$ 0	
Motor vehicle #1	$ 0	Make/year: N/A model: N/A reg.# N/A
Motor vehicle #2	$ 0	Make/year: model: reg.#
Other assets	$ 0	
	$	
	$	
	$	

6. State every person, business or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
N/A	$ 0	$ 0
	$	$
	$	$

7. State the persons who rely on you or your spouse for support.

Name	Relationship	Age
N/A	N/A	N/A

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home)	$ 0	$ 0
Are real-estate taxes included?	____ Yes ____ No	
Is property insurance included?	____ Yes ____ No	
Utilities (electricity, heating fuel, water, sewer, and telephone)	$ 0	$ 0
	$ 0	$ 0
Home maintenance (repairs and upkeep)	$ 0	$ 0
Food	$ 0	$ 0
Clothing	$ 0	$ 0
Laundry and dry cleaning	$ 0	$ 0
Medical and dental expenses	$ 0	$ 0
Transportation (not included in motor vehicle payments)	$ 0	$ 0
Recreation, entertainment, newspapers, magazines, etc.	$ 0	$ 0

Insurance (not deducted from wages or included in Mortgage payments	$ 0	$ 0
Homeowner's or renter's	$ 0	$ 0
Life	$ 0	$ 0
Health	$ 0	$ 0
Motor vehicle	$ 0	$ 0
Other:_____		
Taxes (not deducted from wages or included in Mortgage payments) (specify):_____	$ 0	$ 0
Installment payments	$ 0	$ 0
Motor vehicle	$ 0	$ 0
Credit card (name)_____	$ 0	$ 0
Department store _____	$ 0	$ 0
Other:_____	$ 0	$ 0
Alimony, maintenance, and support paid to others	$ 0	$ 0
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$ 0	$ 0
Other (specify)_____	$ 0	$ 0
Total monthly expenses:	**$** 0	**$** 0

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months? _____ Yes _X___ No
If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? _____ Yes __X__ No
If yes, how much? $_____
If yes, state the attorney's name, address and telephone number:

_____

11. Have you paid – or will you be paying – anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form? _____ Yes ____X__ No
If yes, how much? $_____
If yes, state the person's name, address and telephone number:

_____

12. Provide any other information that will help explain why you cannot pay the docket fees for your appeal.

I am indigent and incarcerated.

13. State the address of your legal residence.

MOUND ROAD CORRECTIONAL FACILITY
17601 MOUND ROAD
DETROIT, MICHIGAN 48201

Your daytime phone number: ( ) **N/A**

Your age: 30 Your years of schooling: 2 yrs College

Your social security number: 346-46-7318

12. Provide any other information that will help explain why you cannot pay the docket fees for your appeal.

I am indigent and incarcerated.

13. State the address of your legal residence.

MOUND ROAD CORRECTIONAL FACILITY
17601 MOUND ROAD
DETROIT, MICHIGAN 48212

Your daytime phone number: ( ) **N/A**

Your age: 30 Your years of schooling: 2 yrs College

Your social security number: 386-66-2218

FEDERAL COURT - CIVIL ACTION

Prisoner-Plaintiff/Petitioner/Appellant name and number		Defendant's/Respondent's/Appellee's name
L. Burke, Warden 0	V	Kermit Haynes

CERTIFICATE OF PRISONER INSTITUTIONAL/TRUST FUND ACCOUNT ACTIVITY

I am employed by the Michigan Department of Corrections at the facility identified below, at which the prisoner identified as the Plaintiff/Petitioner/Appellant is currently incarcerated.

Attached is a computer printout which accurately reflects the current spendable balance and all activity within this prisoner's account during the preceding six months or, if the prisoner has been incarcerated for less than six months, for the period of incarceration. Code "C" on the printout represents a withdrawal from the account and code "D" represents a deposit to the account. The attached printout reflects, for the reported period, an average monthly account deposit (i.e., total deposits divided by number of months) of $34.67, an average monthly account balance (i.e., total deposits minus total withdrawals divided by number of months) of $3.91. There is a current spendable account balance of $23.24.

Date: 12/04/02

[illegible]
Signature of Custodian of Prisoner Institutional/Trust Fund Account

MOUND ROAD CORRECTIONAL FACILITY
Correctional Facility

CSJ-277 6/97
4835-3277

[illegible]higan Department Of Correctior

Trust Account Statement

For the period 06/04/2002 to 12/04/2002

MDOC Nbr.: 266404 Name: HAYNES, KERMIT Current Lock Loc.: 7B-40U

Birth Date: 07/08/1972 Location: MOUND CORRECTIONAL FAC Jurisdiction Dates: 05/13/1998 Active: Yes

Current Balance: 23.24 Hold Balance: .00 Account Dates: 02/26/2002 A/C. Status: Acti

Sub Account Details

Account Code	Account Name	Balance As of 06/04/2002	Balance As of 12/04/2002
Trust-Mound Facility Caseload			
2101	Offender Funds	0.00	23.24
2198	Freeze	0.00	0.00

Debts & Obligations

Deduction Type		Information No.	Effective Date	Original Amount	Amount Paid	Amount Owed
Trust-Mound Facility Caseload						
OLCPB	Legal Copies (PBF)	1012304	05/23/2002	0.23	0.23	0.00
OLCPB	Legal Copies (PBF)	1417031	06/28/2002	1.50	1.50	0.00

Transaction Details

GJ No.	Date	Description		Debit	Credit
Trust-Mound Facility Caseload					
1417031	06/28/2002	***LCPBD Legal Copies Disbursement (PBF)***	**1.50**		
		2101 Offender Funds		0.00	
		2580 Copies (PBF) Payable - Direct			0.00
	Narration:	*Batch: 53228, Ref: -*			
1897736	08/09/2002	***PR Payroll Receipt***	**30.13**		
		1116 Payroll Receipts		30.13	
		2506 Copies (PBF) Payable			0.23
		2506 Copies (PBF) Payable			1.50
		2101 Offender Funds			28.40
	Narration:	*Batch: 70946, Ref:*			
1897741	08/09/2002	***PR Payroll Receipt***	**28.82**		
		1116 Payroll Receipts		28.82	
		2101 Offender Funds			28.82
	Narration:	*Batch: 70946, Ref:June '02-Payroll-Amended*			
1926222	08/13/2002	***VSTR Visitation Receipt***	**50.00**		
		1107 Visitation Receipts		50.00	
		2101 Offender Funds			50.00
	Narration:	*Batch: 73038, Ref:*			
2007646	08/19/2002	***CRT Commissary Regular Transaction***	**36.30**		
		2101 Offender Funds		36.30	
		2501 Payable to Commissary			36.30
	Narration:	*R*			
2220348	09/10/2002	***PR Payroll Receipt***	**30.13**		
		1116 Payroll Receipts		30.13	
		2101 Offender Funds			30.13
	Narration:	*Batch: 84493, Ref:*			
2244050	09/11/2002	***CRT Commissary Regular Transaction***	**33.66**		
		2101 Offender Funds		33.66	
		2501 Payable to Commissary			33.66
	Narration:	*R*			
2343340	09/18/2002	***CRT Commissary Regular Transaction***	**3.07**		
		2101 Offender Funds		3.07	
		2501 Payable to Commissary			3.07
	Narration:	*R*			
2449534	09/30/2002	***MRR Mail Room Receipt***	**10.00**		
		1106 Mailroom Receipts		10.00	

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Trust Account Statement

For the period 06/04/2002 to 12/04/2002

MDOC Nbr.: 266404 Name: HAYNES, KERMIT Current Lock Loc.: 7B-40U

Birth Date: 07/08/1972 Location: MOUND CORRECTIONAL FAC Jurisdiction Dates: 05/13/1998 Active: Yes

Current Balance: 23.24 Hold Balance: 00 Account Dates: 02/26/2002 A/C. Status: Actv

GJ No.	Date	Description		Debit	Credit
Trust-Mound Facility Caseload					
		2101 Offender Funds			10.00
	Narration:	*Batch: 94379, Ref:*			
2523021	**10/07/2002**	***LCSTD Legal Copies Disbursement (State)***	**.60**		
		2101 Offender Funds		0.60	
		2581 Copies (State) Payable - Direct			0.60
	Narration:	*Batch: 97351, Ref: -*			
2567776	**10/10/2002**	***PR Payroll Receipt***	**28.82**		
		1116 Payroll Receipts		28.82	
		2101 Offender Funds			28.82
	Narration:	*Batch: 99026, Ref:*			
2574624	**10/10/2002**	***CRT Commissary Regular Transaction***	**34.81**		
		2101 Offender Funds		34.81	
		2501 Payable to Commissary			34.81
	Narration:	*R[illegible] -Commissary TXN -*			
2672902	**10/17/2002**	***LCSTD Legal Copies Disbursement (State)***	**.60**		
		2101 Offender Funds		0.60	
		2581 Copies (State) Payable - Direct			0.60
	Narration:	*Batch: 102504, Ref: -*			
2676400	**10/17/2002**	***CRT Commissary Regular Transaction***	**4.28**		
		2101 Offender Funds		4.28	
		2501 Payable to Commissary			4.28
	Narration:	*R*			
2704183	**10/21/2002**	***REGPD Regular Postage Disbursement***	**1.29**		
		2101 Offender Funds		1.29	
		2583 Postage (State) Payable - Direct			1.29
	Narration:	*Batch: 103901, Ref: -*			
2818324	**11/01/2002**	***CRT Commissary Regular Transaction***	**34.32**		
		2101 Offender Funds		34.32	
		2501 Payable to Commissary			34.32
	Narration:	*R*			
2911800	**11/08/2002**	***PR Payroll Receipt***	**30.13**		
		1116 Payroll Receipts		30.13	
		2101 Offender Funds			30.13
	Narration:	*Batch: 111104, Ref:*			
2939927	**11/13/2002**	***MISCC Miscellaneous Vendor Check***	**6.00**		
		2101 Offender Funds		6.00	
		1101 Bank Account			6.00
	Narration:	*Batch: 113804, Ref:CHRISTMAS PACKAGE -*			
3090238	**11/25/2002**	***CRT Commissary Regular Transaction***	**28.13**		
		2101 Offender Funds		28.13	
		2501 Payable to Commissary			28.13
	Narration:	*R*			

Total Receipts: ***208.03***

Total Disbursments: ***184.56***

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No. 02-806

In The
Supreme Court of the United States

LUELLA BURKE, Warden,

Petitioner,

vs.

KERMIT HAYNES,

Respondent.
_____/

**BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

SUBMITTED BY:
SUSAN M. MEINBERG (P 34433)
Assistant Defender

MARLA R. McCOWAN (P 57218)
Assistant Defender
(Counsel of Record)
State Appellate Defender Office of Michigan
645 Griswold Street
3300 Penobscot Building
Detroit, Michigan 48226
(313) 256-9833

REASONS FOR DENYING THE WRIT

There Are No Compelling Reasons
to Review the Decision of the Sixth Circuit Court of Appeals.

A. THE DISTRICT AND CIRCUIT COURTS APPLIED THE CORRECT LEGAL STANDARD WHEN GRANTING THE PETITION FOR WRIT OF HABEAS CORPUS.

In their lead issue, Petitioner goes to great lengths to characterize the Sixth Circuit's Opinion as a "new rule" of law premised on an incorrect application of ineffective assistance of counsel jurisprudence purportedly distinguishing between direct and collateral consequences of a guilty plea, and misadvice versus omitted advice offered by counsel. This Court has never made such distinctions, and even the most cursory review of this record reveals that Mr. Haynes received the ineffective assistance of counsel during his plea in accordance with this Court's decisions in Strickland v. Washington, 466 U.S. 668 (1984) and Hill v. Lockhart, 474 U.S. 52 (1985).

The fact of the matter is that counsel failed to inform Mr. Haynes of the **consequences** of pleading guilty to first-degree murder. Mr. Haynes believed, based on representations by his attorney, that if he pled guilty in front of Judge Roberson he would have a great chance of being sentenced as a juvenile. For that reason, he pled guilty. His attorney did not inform him of the consequences of such a plea. Specifically, Mr. Haynes was not told that his sentence could be appealed, and that the trial court could be left with no alternative but to sentence him to a term of life in prison without the possibility of parole. This was a significant omission on the part of defense counsel, undermining the very essence and the purpose of the plea.

Importantly, Petitioner does not challenge Respondent's claim that his attorney failed to fully advise him of the consequences of his plea. Miller v. Straub, 299 F.3d 570, 581 (6th Cir. 2002). Therefore, counsel was ineffective within the meaning of Strickland v. Washington,

supra, and Hill v. Lockhart, supra. Whether the consequences were "direct" or "collateral" has never been the standard for assessing counsel's performance by this Court. Miller v. Straub, 299 F.3d at 578-579. Therefore, it cannot form the basis for granting or denying relief of claims brought under 28 U.S.C. §2254(d). Id. Furthermore, Petitioner's efforts to differentiate between "misadvice" and "failing to advise" of the consequences of a plea is nothing more than a semantics exercise unwarranting certiorari to this Court.

Both the District and Circuit Courts correctly concluded that Mr. Haynes was prejudiced by his counsel's deficient performance, because there is a reasonable probability that he would not have pled guilty had his attorney competently advised him of the sentencing risks associated with the plea. The state court decisions to the contrary were "objectively unreasonable." Miller v. Straub, 299 F.3d at 583.

The Sixth Circuit's decision is soundly based on established Supreme Court precedent. The petition for writ of certiorari must be denied.

B. THERE ARE NO OTHER REASONS FOR GRANTING THE WRIT.

The remainder of the petition seeks to use this case as a vehicle for clarifying the standard of review set forth in 28 U.S.C. §2254(d). Respondent asserts that the standard of review for adjudicating habeas corpus petitions was correctly employed in the instant case by both the Sixth Circuit and the Eastern District of Michigan. Therefore, unrest among the circuits regarding the standard of review should not form the basis for granting certiorari in these proceedings, but rather left to be addressed by those cases that present close questions.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari must be denied.

STATE APPELLATE DEFENDER OFFICE

Counsel for Respondent

BY: _____

MARLA R. McCOWAN (P 57218)
Assistant Defender
Counsel of Record
3300 Penobscot Building
645 Griswold
Detroit, Michigan 48226
(313) 256-9833

Date: December 16, 2002

No. 02-806

In The
Supreme Court of the United States

LUELLA BURKE, Warden,

Petitioner,

vs.

KERMIT HAYNES,

Respondent.
_____/

PROOF OF SERVICE

STATE OF MICHIGAN)
) ss.
COUNTY OF OAKLAND)

Marla R. McCowan, being first duly sworn, deposes and says that on December 16, 2002, she mailed one copy of the following:

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS
AFFIDAVIT OF INDIGENCY

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

via U. S. Mail to:
Timothy A. Baughman
Chief of Research, Training & Appeals
12th Floor, 1441 St. Antoine Street
Detroit, Michigan 48226

MARLA R. McCOWAN

Subscribed and sworn to before me
December 16, 2002

Susan M. Meinberg
Susan M. Meinberg
Notary Public, Oakland County, Michigan
My commission expires: 02-13-04
IDENS #8911 & 13299 - MARLA R. MCCOWAN for SMM

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2002

LUELLA BURKE, Warden, Saginaw Correctional Facility,
Petitioner,

C 2-80

vs.

KERMIT HAYNES,
Respondent.

PROOF OF SERVICE

STATE OF MICHIGAN)
COUNTY OF WAYNE)ss

The undersigned deponent, being duly sworn, deposes and says that she/he served three (3) true copies of the **Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit** upon: Susan M. Meinberg/Marla R. McCowan, Assistant Defenders, the attorneys for the above-named Respondent, by depositing said pleading in the U.S. Mail, in the City of Detroit, enclosed in an envelope bearing postage fully prepaid, on November 21, 2002 plainly addressed as follows:

Susan M. Meinberg/Marla R. McCowan
State Appellate Defender Office
3300 Penobscot Building, 645 Griswold
Detroit, MI 48226

Ms. Brenda E. Turner
Michigan Department of Attorney General
Habeas Corpus Division
P.O. Box 30217, Lansing, MI 48909

Joycelyn Sharp

and said pleading and proof was filed in the United States Supreme Court by Federal Express to the following address:

William K. Suter, Clerk
Supreme Court of the United States
1 First Street NE
Washington, D.C. 20543

RECEIVED
NOV 26 2002
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Subscribed and sworn to before me
this 22nd day of **November, 2002**
Oneitha H. Edwards
Oneitha H. Edwards
Notary Public, Wayne County, Michigan
My commission expires: 01/23/04